

Court of Appeals No. 46340-7-II
Pierce County Superior Court No. 13-2-15880-4

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

FILED
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DIVISION II
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STATE OF WASHINGTON
BY
DEPUTY

ROBERT KANANY,
APPELLANT,

v.

CITY OF BONNEY LAKE, a municipal corporation; STEPHEN K.
CAUSSEAU, JR., as Bonney Lake Hearing Examiner; and JOHN P.
VODOPICH, as City of Bonney Lake Community Development
Director/Building Official,

RESPONDENTS.

REPLY BRIEF OF APPELLANT

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I. REPLY SUMMARY

First, foremost, and the only true consideration for the Court is that this LUPA *de novo* judicial review relates solely to Robert Kanany's appeal of the City's Code Interpretation of BLMC § 18.22.090(C)(1) and the phrase *in conjunction with* as such relates to the placement of an ADU in the R-2 zone on property upon which a duplex is constructed. That being said, however, there are numerous misstatements and misrepresentations of fact in the City's Counter Statement of the Case that should be corrected for the record.

II. REBUTTAL TO CITY'S COUNTER STATEMENT OF THE CASE

The City alleges that the garages and the space above the garages that were built as an integral part of Kanany's duplexes for use as mother-in-law units (ADUs) were built without its knowledge, or that conditions somehow changed during construction or that Kanany completed the area over the garages behind its back. This simply is not true. The City was well aware of what was being built at all stages of these projects from permit application submittal through completion of construction. CP at 200. Each of these areas was built with an issued permit as part of the duplexes, and the City inspected and approved all of it and nothing has been added or changed since Kanany was issued occupancy permits in 2004 and 2005.¹ CP at 245, ¶ 6.

¹ Kanany spent in excess of \$112,000 on permits, construction, and inspections with the City's knowledge and approval of the livable space over the detached garages on his duplex properties. CP at 205. All the City noted as prohibited was that the garage itself could not be converted to livable space -- something that Kanany has never intended or done.

Regarding the reason for initiation of the underlying Code Interpretation, after four years of expressly permitted use of the over-garage area at one of his duplexes, and with absolutely nothing changed with respect to the area or its known use, the City bowed to neighbor-generated pressure and began enforcement actions against Kanany under its Code relating to ADUs. Kanany in fact properly responded to City inquiries but the City nevertheless declined to acknowledge such written response and the fact that conditions had not changed one iota. CP at 202 - 03. Kanany invited the City to once again visit and inspect his duplex property, which it did not do. Instead, the City pursued its enforcement action notwithstanding the fact that its ADU Code was misinterpreted and misapplied to his duplex property in the R-2 zone. In a good faith effort to work with the City and obtain any additional permission for continued use of the over-garage areas, although the City specifically told him repeatedly that such was not required for the specific use of such area, Kanany attempted to secure an ADU permit from the City. The City refused to process his application and instead directed him to seek a Code Interpretation, which he did thus resulting in this action and appeal.²

None of Kanany's assertions are frivolous, and all directly relate to the issues he presents for this Court's review. For example, when he was given

² The City alleges that the real reason for this appeal is that Kanany is simply dissatisfied with the Code Interpretation. Again, the City mischaracterizes Kanany's motives. Kanany has property rights in the legal use of his real property that are denied by the City's misinterpretation and misapplication of its Zoning Code. Kanany is pursuing this appeal for the purpose of regaining the full legal use of his property and providing affordable housing to increase the needed housing supply through the highest and best use of his R-2 zoned property.

notice on a Tuesday that the hearing on his administrative appeal was to held that Friday, Kanany contacted the City and the Hearing Examiner and requested a brief continuance and a copy of the applicable Rules of Procedure to follow because no Rules were available on line and the short advance notice of the hearing date was very insufficient for him to get all of his witnesses notified and available to testify. The City immediately declined to support Kanany's request and the Hearing Examiner waited until Thursday to notify him that there would be no continuance. It was not until Thursday evening that Kanany in fact received this denial and that the hearing would go forward the next morning at 9 AM. As for any statutorily required Rules of Procedure, Kanany was never given any Rules because, as was not discovered until the hearing, the City has never adopted any Rules of Procedure governing hearings conducted by its Hearing Examiner. CP at 207. As a result of this absence, the hearing was conducted on an *ad hoc* basis with all that the City wished to have entered into the record being admitted, and even led to be offered and then admitted by and though the City's Hearing Examiner, and much of what Kanany offered or intended to be offered through witness testimony was denied or severely cut short.³

³ What Kanany was attempting to present during the hearing was testimony and documentary evidence to explain how the City's Code Interpretation didn't harmonize with the true reasons underlying the City Code applicable to ADUs. Kanany also had an expert from Pierce County Housing Authority present to speak of the importance of affordable housing in Pierce county and in particular Bonney Lake. The Hearing Examiner did not even allow Kanany's affordable housing expert to speak and told his other expert, Fred Brown, to just give him a copy of what Brown wanted him to know and he would read it. Kanany again asked the Hearing Examiner for the Rules during the hearing because the proceedings were (continued...)

With the record now being set straight, Kanany refocuses the Court's attention on the relevant and dispositive legal issues presented in his appeal.

III. COURT'S FOCUS MUST BE ON THE CODE AND ITS PROPER INTERPRETATION

Rather than focusing on the claimed personalities and biases of the various parties and players involved which are irrelevant, immaterial, and likely highlighted by the City to engender a degree of prejudice,⁴ the Court should focus on the Code and take into consideration the legislative history of the adoption of that BLMC provision concurrently with the City's adoption of former BLMC § 18.16.020(A) in light of the express adopted goals, objectives, and policies of the City's Comprehensive Land Use Plan and its stated purpose to provide for affordable housing by allowing ADUs in all residential zones, including the R-2 zone, without exception or limitation. *See* CP at 99 (Ordinance No. 747, at p. 1, referencing Goal 2-8 and Policy 2-

³(...continued)

very one sided. Further, Kanany intended to call a former City Council member who was on the Council when the subject Code was adopted and who would have shed light on the legislative intent and purposes underlying the ADU provisions. This testimony would have been most helpful as turnover of both Council members and City staff has resulted in those persons with direct knowledge of not only the Code's adoption but also of Kanany's duplex projects are long since gone, and with them their personal knowledge of the facts vital to the Code Interpretation. Kanany also intended to call the contractor who was Kanany's contact with the City during the permitting and construction phases of Kanany's duplex units, as well as for the construction of the same setup for himself and for another person that were approved by the City. This testimony would have been relevant and helpful – but all was denied by the Hearing Examiner's refusal to grant Kanany any reasonable continuance. All of this in light of the Hearing Examiner's admission that there are no Rules and that all proceedings are conducted on an *ad hoc* basis. *See* CP at 206 - 07.

⁴ Although the City excessively dwells on the personality issue and conjectured motives of the various parties and players, it is apparent that the Hearing Examiner did not do so, and neither should this Court. *See* CP at 245, ¶ 6 (Finding of Fact).

8f of the adopted City Comprehensive Plan in effect at the time the City enacted Ordinance No. 747); CP at 115 - 16 (Ordinance No. 721, Goal 2-8 and Policy 2-8f). Noteworthy, however, is that when Kanany presented an expert witness to provide testimony at the hearing before the City Hearing Examiner regarding and relating to the issue of the Code Interpretation's effect on the need for affordable housing and density, that expert was summarily cut off and denied the opportunity to present direct oral testimony and no meaningful discussion was allowed at the hearing. *See* CP at 217 - 18. It is apparent that neither City staff nor its Hearing Examiner in any manner attempted to consider the BLMC and the Code Interpretation in light of the City's Comprehensive Plan requirement to provide affordable housing by allowing ADUs in the R-2 zone, where duplexes and townhouses are outright permitted uses and single family residences are not. *See* CP at 145 (City-adopted zoning matrix). This flagrant resistance and omission notwithstanding the statutory mandatory duty on the Hearing Examiner to "set forth [in the written findings and conclusions] the manner in which the decision would *carry out and conform to the city's comprehensive plan* and the city's development regulations," RCW 35A.63.170(3) (italics added), results in the Hearing Examiner's decision being contrary to and an error of law, and unsupported by substantial competent evidence in the record. RCW 36.70C. 130(1)(b), -(c), and -(d).

IV. ABSENCE OF STATUTORILY REQUIRED RULES OF PROCEDURE IS NOT HARMLESS

The absence of adopted Rules of Procedure uniformly governing the Bonney Lake Hearing Examiner system⁵ is a fatal defect and deficiency directly contrary to a statutory mandate that was unfairly prejudicial to Kanany and directly affected the conduct and outcome of the hearing.⁶ Without set Rules governing the process and as to which all participants and citizen observers are given advance notice, Kanany was subjected to an *ad hoc* on-the-fly set of procedural decisions both prior to and during the hearing by the Hearing Examiner as to which Kanany, or even seasoned attorneys, was ill-prepared and equipped to timely respond and meet; *e.g.*, the lack of discovery and short time frame given to file hearing exhibits and briefs; the denial of a continuance necessary for additional witnesses having direct and essential knowledge to participate; the Hearing Examiner's direct query to the City's legal counsel to elicit answers to leading questions on matters failed to be addressed in counsel's presentation; and summarily cutting off Kanany's witnesses on purported grounds of irrelevance while allowing the City's counsel, unsworn and not subject to cross-examination, to venture forth in his

⁵ See CP at 207, lines 21 - 26.

⁶ In order for a City to have a Hearing Examiner system for conducting land use hearings and appeals, the Legislature mandated that "the [local] legislative body **shall** prescribe procedures to be followed by a hearing examiner." RCW 35A.63.170(1) (emphasis added). See also RCW 35.63.130(1); RCW 58.17.330(1) (identical mandate). Accordingly, it is mandatory that the City Council act affirmatively to formally adopt Rules of Procedure; such promulgation cannot be delegated to each individual Hearing Examiner to prescribe Rules on an *ad hoc* basis during the course of a hearing.

presentation of materials that were irrelevant and immaterial, and prejudicial to Kanany. The lack of mandatory Rules of Procedure is a clear violation of constitutional due process⁷ is not harmless, and alone constitutes sufficient grounds for vacating the Hearing Examiner's final decision on Kanany's Code Interpretation appeal. RCW 36.70C.130(1)(a); RCW 36.70C.130(1)(f); *Tombs v. Northwest Airlines, Inc.*, 83 Wn.2d 157, 161-62, 516 P.2d 1028 (1973) (failure to adopt mandatory Rules of Procedure voids the hearing and any decisions made thereunder). The City has attempted in the past to point to other similarly sized jurisdictions in Washington that have Hearing Examiner systems comparable to its own in defense of its abject failure to adopt its own set of Rules. However, such attempt failed to hold sway, as each of these other jurisdictions' hearing examiner system is likewise in direct violation of the statutory mandate and fails to pass constitutional muster. The claimed company of equally defective Hearing Examiner systems can be of no legal solace to the City of Bonney Lake (in other words, any defense by the City that because other cities are doing equal to or less than we are, then our system must *ipso facto* be procedurally sufficient to meet due process

⁷ *Harnett v. Board of Zoning*, 350 F. Supp. 1159 (D.V.I. 1972) (ad hoc rule-making is arbitrary and violates due process); *Boller Beverages, Inc. v. Davis*, 183 A.2d 64, 71 (N.J. 1962) (participants in quasi-judicial hearings are entitled to know in advance the so-called Rules of the game); *Historic Green Springs, Inc. v. Bergland*, 497 F. Supp. 839, 852-56 (E.D. Va. 1980) ("The timely notice of rules of procedure . . . contemplates a reasonably complete code of procedures set out in advance by which action can be guided and strategies planned"); *State of Michigan v. Bayshore Associates, Inc.*, 533 N.W.2d 593 (Mich. App. 1995) (the lack of properly promulgated procedural rules does not provide due process); *State v. Klemmer*, 566 A.2d 836 (N.J. Super. 1989) (procedural rules that are nonexistent and legally unavailable to those persons required to abide by them are more offensive to constitutional due process than enactments which are only vague).

requirements, fails to pass constitutional muster).⁸

**V. INTERPRETING AND APPLYING *IN CONJUNCTION WITH*
IN THE MANNER ARGUED BY KANANY NOT ONLY
INCREASES DENSITY, BUT ALSO PROVIDES FOR
AFFORDABLE HOUSING IN THE R-2 ZONE IN CONFORMITY
WITH THE CITY'S COMPREHENSIVE LAND USE PLAN**

The City yet argues that Kanany's suggested interpretation of the phrase "in conjunction with" is nonsensical and results in unintended consequences. Far from that perspective, Kanany's interpretation is the only logical construction and application of the phrase that results in (1) increased density (*see* CP at 213 - 14), and (2) conformance with the City's Comprehensive Plan's intent to provide affordable housing in all of its zones, including the R-2 with duplexes and without limitation on the location of ADUs. The City's contention that only allowing ADUs in the R-2 zone as an adjunct to single family residences belies belief, as the City's adopted zoning matrix as a matter of law does not allow single family residences in the R-2 zone as an outright permitted use, thus making those existing residences a nonconforming use and subject to eventual discontinuance.⁹ Moreover, according to the City's zoning matrix, townhouses (as specially defined by the BLMC) are an

⁸ Procedural due process mandated by State statute is not dependent upon the size of the municipality because of the fundamental property interests at stake. Various municipalities have in fact adopted detailed Rules of Procedure that are readily available to the City of Bonney Lake for easy reference; *see* <http://www.mrsc.org/subjects/planning/hearex.aspx>.

⁹ "The policy of zoning legislation is to phase out a nonconforming use." *Open Door Baptist Church v. Clark County*, 140 Wn.2d 143, 150, 995 P.2d 33 (2000). Generally, "nonconforming status . . . will not grant the right to significantly change, alter, extend, or enlarge the existing use." *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wn.2d 1, 7, 959 P.2d 1024 (1998). As a result, no ADU can be added to an existing single family residence that is located in the R-2 zone; hence, there is no resulting increase in density.

outright permitted use in the R-2 zone and on such property may also be located an ADU; as it is only with respect to duplex units in the R-2 zone that, according to the City, would be precluded from having located an ADU on the same property. *See* CP at 95 - 96, 145. This restrictive interpretation not only makes no logical sense, it is directly contrary to the express stated intent of the City's Comprehensive Plan and denies the owners of duplex properties in the City, including Kanany, a valuable and constitutionally-protected property development right.¹⁰ RCW 36.70C.130(1)(f); *see, e.g., Valley View Industrial Park v. Redmond*, 107 Wn.2d 621, 733 P.2d 182 (1987) (development rights constitute a valuable property right protected by constitutional due process guarantee).

VI. CITY IS NOT ENTITLED TO AN AWARD OF ITS ATTORNEY FEES AND COSTS IN THIS APPEAL

The City asks this Court to award it attorney fees and costs incurred in this appeal pursuant to RCW 4.84.370. However, an award of such fees and costs under this statutory provision is expressly limited to the further review of land use decisions *similar to* a local decision to "issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, [or] site plan." RCW 4.84.370(1). The Code Interpretation requested by Kanany, and now under

¹⁰ "Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities." *Washington ex rel. Seattle Title Trust Company v. Roberge*, 278 U.S. 116, 121, 73 L. Ed. 210, 49 S. Ct. 50 (1928). Such restrictions constitute a taking of private property and are subject to invalidation by the Court under the Due Process Clause. *Roberge*, 278 U.S. at 121.

review by this Court, is not such a *similar* development permit as expressly referenced in RCW 4.84.370(1). Moreover, the Code Interpretation requested by Kanany has general applicability to all duplex properties in the R-2 zones of the City of Bonney Lake and is not site specific as required under the statute. Fee award statutes must be strictly construed and not expanded beyond its express language. *Gerard v. San Juan County*, 43 Wn. App. 54, 63, 715 P.2d 149 (1986) (strict construction of statutory attorney fee award provisions); *Daviscourt v. Peistrup*, 40 Wn. App. 433, 444, 698 P.2d 1093 (1985) (fee award statutes strictly construed as creating only a narrow exception to the general rule of nonrecovery of litigation expenses); *In re Petition of City of Renton*, 79 Wn.2d 374, 485 P.2d 613 (1971) (plain words of fee award statute cannot be judicially expanded beyond its specific language). Accordingly, the expansion of fee awards pursuant to RCW 4.84.370(1) to include code interpretations of general applicability is not permitted and cannot be allowed by the Court. Respectfully, Kanany asks this Court to deny the City's request for an award of attorney fees and costs pursuant to the provisions of RCW 4.84.370(1).

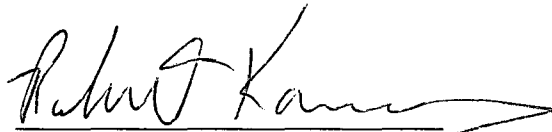
VII. CONCLUSIONS

Respectfully, Robert Kanany has met his burdens and satisfied the standards set forth in RCW 36.70C.130(1)(a) - (f) for this Court to grant him the relief he has requested in his Petition for Judicial Review under LUPA. This Court may fashion suitable relief under the circumstances as suggested

in Kanany's LUPA Petition and as may be provided by law and equity.¹¹

DATED this 1st day of October, 2014.

Respectfully submitted,


Robert Kanany, Pro Se

¹¹ Once formally adopted Rules of Procedure are in place, published and made available to Kanany and all other citizens of the City of Bonney Lake, a new hearing on Kanany's appeal of the Code Interpretation may be noticed and conducted, with a proper and protected presentation of evidence and witnesses made before a different Hearing Examiner, to ensure a fundamentally fair and impartial hearing and decision.

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STATE OF WASHINGTON)
) ss. DECLARATION OF ROBERT
) ss. KANANY
COUNTY OF PIERCE)

ROBERT KANANY hereby says and states under penalty of perjury:

1. I am over the age of 21 and I am competent to testify regarding the matters herein described. I make this declaration on my own personal knowledge.

2. I am the Appellant Pro Se in the appeal captioned *Robert Kanany v. City of Bonney Lake, et al.*, Pierce County Superior Court No. 13-2-15880-4, and Court of Appeals, Division II, No. 46340-7-II.

3. By postage prepaid first class mail on October 1, 2014, I served on the other parties in this action, through their respective counsel, a copy of the REPLY BRIEF OF APPELLANT and this DECLARATION OF SERVICE filed in this matter, by placing in the United States mail the same addressed to:

Mark D. Orthmann
Porter Foster Rorick LLP
800 Two Union Square, 601 Union Street
Seattle, Washington 98101

Attorney for Respondents City of Bonney Lake, et al.

4. By postage prepaid first class mail on October 1, 2014, I served on the Court of Appeals, Division II, the original and one (1) copy of the REPLY BRIEF OF APPELLANT and the original DECLARATION OF SERVICE filed in this matter, by placing in the United States mail the same

DECLARATION OF
SERVICE
-- PAGE 1 OF 2

addressed to:

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Clerk/Administrator

5. Pursuant to the provisions of RAP 10.2(d), 10.2(h), and 10.4(a)(1), Appellant's Reply Brief has been properly filed and all parties required to be served with a copy of both the REPLY BRIEF OF APPELLANT and this DECLARATION OF SERVICE have been served as set forth above.

I certify and declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

October 1, 2014
DATE



ROBERT KANANY (WRITTEN)
PRO SE

Bonney Lake, WA
PLACE OF SIGNATURE

Robert Kanany

ROBERT KANANY (PRINTED)